for The Defense

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The Training Newsletter for the
Maricopa County Public Defender's Office

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Maricopa County Public Defender

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Tipping the Scales Back to the Accused!
by Christopher Johns

Crime!! The word has come to connote fear and panic. At no other time has there been as much need for the well-armed (and armored) defense counsel. This month's lead article is a compilation of practice tips geared to help the dedicated souls willing to defend the accused.

Many of the practice tips in this article were passed along to me by more gifted practitioners in our office. Where I could remember who they were, I've given them credit.

Look Who's Not Talking

A recurring issue for defense counsel is the alleged crime victim who refuses a pretrial interview and then testifies at trial. Some prosecutors and judges are refusing to allow defense counsel to vigorously cross-examine the alleged victim on his pretrial refusal to be interviewed.

Just about every month our training division gets several calls from attorneys (within and outside the office) about a trial judge who is buying the government's argument that defense counsel has no right to inquire into this area because so-called victims have a constitutional right to refuse an interview. Prosecutors, and apparently some judges, make the misplaced analogy to the U.S. and Arizona constitutional right to silence in the face of government interrogation.

Well, *for the Defense* thinks they are wrong. It is an egregious abuse of judicial discretion to restrict defense counsel's cross-examination of the alleged victim witness. Here's the argument that you'll probably want to make part of your trial notebook:

Cross-examination Fundamental to Justice: Unchain My Heart

First, about every basic law book around acknowledges that the right to cross-examination is a fundamental part of our criminal justice system. *See, e.g.*, M. Udall, J. Livermore, P. Escher & McIvain. *Law of Evidence (3rd Ed. 1991).* Plus the Evidence Rules make it plain that "cross-examination in Arizona is not restricted to matters covered on direct examination, but may extend to *any matter relevant to the case." See* Rule 611(b).

A witness's refusal to talk to defense counsel prior to trial goes to his credibility. "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and

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his credibility to a test, without which the jury cannot fairly appraise them." *Alford v. U.S., 282 U.S. 687, 51 S.Ct. 218 (1931). See also State v. Little*, 87 Ariz. 295, 350 P.2d 756 (1960).

Second, while an alleged victim in Arizona does have a state constitutional right to refuse an interview by the defendant or her attorney, complaining witnesses do not have the right to refuse to testify at an accused's trial. *S.A. v. Superior Court*, ___ Ariz. ___, 831 P.2d 1297 (App. 1992).

Statutory Language Clarifies: I Can See Clearly

Moreover, the Victims' Rights Implementation Act provides that "if the defendant or the defendant's attorney comments at trial on the victim's refusal to be interviewed, the court shall instruct the jury that the victim has the right to refuse an interview under the Arizona Constitution." A.R.S. Section 13-4433(E).

By enacting A.R.S. 13-4433(E), the legislature recognized that alleged victim-witnesses who refuse pretrial interviews would be challenged on cross-examination during trial. Why else enact such an explicit provision? Hence, defense counsel is entitled to go into the facts and circumstances surrounding the alleged victim's refusal to interview prior to trial. Not only may this cross-examination result in testimony bearing on credibility, but also motive, and in some instances prosecutorial misconduct (e.g., where the prosecutor failed to *promptly* notify an alleged victim of defense counsel's interview request).

for The Defense

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Gone With The Wind

Like the *fish* that got away, sometimes clients' lack of faith in the fairness of the criminal justice system inspires them to search for justice in other places. Some prosecutors, in the spirit of fairness, then insist on trying our clients *in absentia*. If it weren't already lonely enough to be a defense lawyer, trying a case *in absentia* is much like the cold trek to a Tibetan temple---even when you get there not much is happening.

Well, praises to Justice Blackmun. In *Crosby v. U.S., 113 S.Ct. 748 (1993)*, the Supreme Court held that Federal Rule of Criminal Procedure 43 prohibits the trial *in absentia* of an accused who is unavailable prior to trial and is absent at its beginning. In other words, if a client *disappears* during the trial there is no reason why it shouldn't proceed without her. If, however, the client is not there for the beginning of the trial the federal rules and *sound public policy* favor not trying the accused. According to Justice Blackmun's opinion for the majority, "[t]he language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial."

Stand Up for Your Rights: Mr. Marley

"Get up, stand up for your rights!" What's the Arizona connection? You guessed it. Rule 19.2 of the Arizona Criminal Rules is similar to Rule 43. At least the operative language that the accused "has the right to be present at every stage of the trial" is the same point. Although Rule 9.1 of the Arizona Rules purports to allow the defendant to waive his presence, it does not specifically authorize trials *in absentia*. Plus, the comment to Rule 9.1 drones on about its similarity to Rule 43 and that "[n]o major change in the law is intended." Let's face it, in times of scarce judicial resources, this is just common sense. Practitioners should rely upon the arguments of *Crosby* to avoid trials *in absentia. [case submitted by Carol Carrigan].*

I Think I'm Going Out of My Head

Our client's mental competence to stand trial is a fundamental prerequisite of the adversarial nature of the criminal justice system. Many savvy criminal law practitioners are skeptical of the low threshold that the "system" uses to determine our client's ability to assist in his own defense. Talk about trials *in absentia*. Despite findings by mental health professionals that clients are "competent," many just can't assist counsel or know what's going on. Well, what would you think if you knew that the clients are actually coached about the nature

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of the system, and that Correctional Health Services routinely "schools" clients in the nuances of the criminal justice system?

Rule 11 School: Dazed & Confused For So Long It's Not True

That's right, the same adversarial system that practitioners rely on to resolve competence issues actively teaches clients to be "competent." Correctional Health Services runs what is called "Rule 11 Group" at the Durango Jail. What is Rule 11 Group? When our clients are found incompetent, they are sometimes, apparently, asked to participate in several group sessions with a psychologist to coach them on information about the criminal justice system.

In other words, when clients are "restored " to competence, it is not just because their medication suddenly took effect. It may be, in fact, because the client has been attending Rule 11 Group with a Correctional Health therapist. The therapist's role--restore the client to competence.

This is important information that practitioners should be aware of in any further proceedings on competence. The fact that the client was "schooled" may be an important detail that the fact finder should know. While the client may have memorized certain information, it may be that she still can not assist in her own defense. The client, as well as the Correctional Health therapist, may have to be carefully interviewed to determine the nature of treatment and the number of sessions the client attended in "Rule 11 Group" before the client was "restored." Although it is everyone's duty to insure that only competent persons are tried in the criminal justice system, the adversarial nature of the system means that defense counsel is always in the best position to protect the client's rights. *[Notes on Rule 11 Group submitted by Mara Siegel. Mara attended one of the sessions with her client.]*

Wise Crack

Last month *for The Defense* summarized the recent Eastern District of Missouri federal case holding that greater punishment for crack cocaine is constitutionally invalid. On February 11, 1994, U.S. District Judge Clyde S. Cahill, writing for the district court, wrote that the court found no material difference between the chemical properties of crack and powder cocaine. Essentially, according to Judge Cahill, they are one and the same drug. The court further wrote that "[t]he 'symbolic' action of the Congress in raising [the ratio of crack to powder cocaine] is an indication of its irrational and arbitrary actions, and further evidences the failure of the Congress to narrowly tailor its provisions as required by law in suspect class cases."

for The Defense continues to advocate that practitioners use the analysis of *U.S. v. Clary, #89-167-CR(4)* for Arizona drug laws, and even prosecutorial policies.

Don't Be Cruel

Another federal district court decision also has found higher penalties for crack cocaine unconstitutional, however, on an entirely different basis.

On January 24, 1994, U.S. District Judge Louis F. Oberdofer of the U.S. District of Columbia ruled in *U.S. v. Walls et. al.* #92-0234-LFO, that the federal crack cocaine minimums are cruel and unusual punishment. According to the court:

> "In this case, examination of the constitutionality of the crack penalties as applied to defendants . . . may take into account the combined actions of Congress, police and prosecutors, and the courts, which ultimately brought the penalties to bear upon them: the emanations from the racist origins of the Harrison Act, the racist implications arising from the public clamor in 1986 about crack in the inner city, and the unfortunate haste in which Congress passed and enacted the enhancement . . . ."

Practitioners would be wise to remember a quote from Shirley Chisholm in *Unbought and Unbossed (1970):* "Racism is so universal in this country, so widespread and deep-seated, that it is invisible because it is so normal."

I Went Down to the Chelsea Drug Store

One sound I hate is that of our client's loved ones as they wail when clients are led away after a finding of guilt. The process, of course, is not over at that stage; it may in fact just be starting. Advocacy at sentencing is critical to effective, quality, legal representation. Well, you may not always get what you, but if you try, sometimes you get what you need.

You Ain't Nothing But a Hound Dog

May a trial judge consider incidents not resulting in a conviction for sentencing clients? Unfortunately, the simple answer is "yes." Several jurisdictions have held that for sentencing purposes the

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sentencing judge may actually use facts from a case that has gone to trial and where the accused was acquitted!

In *State v. Kelly*, 122 Ariz. 495 (App. 1979), for example, our Arizona Court of Appeals held that a trial court is vested with discretion to consider relevant information about the defendant's past conduct. The *Kelly* case does rely on, however, at least one federal case that extends the analysis further. In *U.S. v. Sweig*, 454 F.2d 181 (2nd Cir. 1972), the court implied that the sentencing court may consider acquitted crimes in sentencing if it was the sentencing judge who heard the case. In those cases, the trial court would have had the opportunity to observe witnesses and the defendant, if she testified. This is an important distinction upon which practitioners may want to rely.

Born to Lose?

Moreover, due process requires balancing the reliability of information. "[A] due process right exists to be sentenced only on information which is accurate and reliable, and sentences based on information or assumptions that are materially false or unreliable violated due process." *See C.J.S. Constitutional Law, Section 1086.* In other words, the client doesn't have to be born to lose.

Street Fight'n Man

Practitioners may use Rule 26.8 of the Criminal Rules to object to presentence reports that contain unreliable information from police reports. Rule 26.8 grants defense counsel the *right* to object to the contents of a presentence report. If the court sustains objections to the presentence report, it may take various actions, including but not limited to:

Excising objectionable language or sections of the report

Ordering a new report with specific instructions and directions

Directing that another probation officer prepare a new report

Ordering the original (objectionable) presentence report sealed.

An incorrect presentence report should never follow the client to prison (or become part of the record for later use again the defendant). *[From a motion submitted by Michael Hruby.]* ■

New DUI/BUI Laws and Not-So-New DHS Regulations

by Gary Kula

With the completion of the recent legislative session, a number of changes have been made in the laws pertaining to the offense of Driving While Under the Influence. These new laws go into effect on July 17, 1994. A number of minor changes have also been made in the DHS regulations. The revised regulations went into effect on February 28, 1994. At the end of this article are several of the revised checklists which will be used as part of the statewide implementation of duplicate breath testing.

I. B.U.I.

Perhaps the most publicized DUI bill to make it through this recent legislative session was House Bill 2187. This bill introduced the criminal offense of Boating While Under the Influence (BUI). The wording of this new offense, which is contained in A.R.S. §5-395, is substantially similar to the language of A.R.S. §28-692. The actual wording of this offense is as follows:

A. IT IS UNLAWFUL FOR ANY PERSON TO OPERATE OR BE IN ACTUAL PHYSICAL CONTROL OF A MOTORIZED WATERCRAFT THAT IS UNDERWAY WITHIN THIS STATE UNDER ANY OF THE FOLLOWING CIRCUMSTANCES:

1. While under the influence of intoxicating liquor, or any drug, a vapor-releasing substance containing a toxic substance or any combination of liquor, drugs or vapor-releasing substances if the person is impaired to the slightest degree.

2. If the person has an alcohol concentration of 0.10 or more within two hours of driving or being in actual physical control of the motorized watercraft.

3. While there is any drug as defined in section 13-3401 or its metabolite in the person's body.

4. If the motorized watercraft is a commercial, motorized watercraft and the person has an alcohol concentration of 0.04 or more.

The offense of BUI has provisions for the same affirmative defense and statutory presumptions which are

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available under A.R.S. §28-692. As far as sentencing goes, many of the provisions are identical to the typical DUI offense. For a first conviction an offender will be required to complete alcohol screening, education and treatment. If completed, the offender will only have to serve 24 hours in jail and the remaining nine days of the ten-day sentence will be suspended. One minor difference between this offense and the typical DUI offense is that the fine for a first offense may not exceed $500.00.

Within the BUI statute, there are also provisions addressing the issue of blood, breath and urine testing. The statute provides that "any person who operates a motorized water raft that is underway within this state shall submit" to a test or tests of his blood, breath, urine or other bodily substance if arrested for BUI or A.R.S. 34-244(35) (see below), (A.R.S. §5-395.03). A person who refuses to submit to any test or tests is subject to a civil sanction of $500.00 (A.R.S. §5-395.03(E)).

Interestingly enough, there is also a felony or aggravated BUI offense. Aggravated BUI is a class 4 felony and occurs when a person commits a third or subsequent violation of BUI. For a third conviction within a five-year period, the offender must serve not less than four months in prison. If convicted of a fourth or subsequent BUI within five years, the offender must serve not less than eight months in prison. Additionally, a person convicted of Aggravated BUI is subject to a boat forfeiture provision. (A.R.S. §5-396.01).

With the creation of a BUI offense, it is now a misdemeanor offense for a person under the age of 21 years to operate or be in actual physical control of a motorized water craft that is underway while there is any "spirituous liquor" in their body. (A.R.S. §4-244(35)). "Underway" has been statutorily defined as meaning that a water craft on public waters is not at anchor, is not made fast to the shore or is not aground. (A.R.S. §5-301(13)).

II. MOTORIZED SKATEBOARDS

Not all news out of the legislature has been bad, however, as thanks to the efforts of the motorized skateboard lobby, the legislature has decided that motorized skateboards are not motor vehicles for purposes of the vehicle code. So as to avoid any confusion between a motorized skateboard, which can travel upward of 20 mph, and a Yugo, which cannot, the statute goes on to define a motorized skateboard as a self-propelled device that has a motor, a deck on which a person may ride and at least two tandem wheels in contact with the ground. (A.R.S. §28-101(36)).

III. M.V.D.

Under current law, M.V.D. has the discretion to suspend or revoke a person's driving privileges if it is determined that the person is incompetent to drive a motor vehicle. (A.R.S. §28-446(A)(5)). This discretionary authority has now been statutorily defined in the new A.R.S. §28-446(A)(5). Under this statute, M.V.D. has the authority to suspend or revoke the driving privileges of a person who "is medically, psychologically or physically incapable of operating a motor vehicle and, based on law enforcement, medical or other department information, the continued operation of a motor vehicle by the licensee would endanger the public health, safety and welfare." Additionally, if M.V.D. has good cause to believe that a person is medically, psychologically or physically incapable of operating a motor vehicle and would endanger the public health, safety and welfare if allowed to continue to drive, an examination may be required to determine if such grounds do in fact exist. (A.R.S. §28-447). In making the determination as to whether good cause exists to suspend or revoke a person's license under these conditions, M.V.D. may now use accident information received under the vehicle code or from other governmental agencies. (A.R.S. §28-447(B)). If this suspension or revocation is entered, there is a provision for an administrative hearing to challenge the findings of the department. (A.R.S. §28-446(F)). In order for a person to get their license back following this type of suspension, certain conditions, which are fully outlined in A.R.S. §28-448(F)(1) and (2), must be met.

The vehicle code has also been amended as to the consequences for a conviction for the offense of driving while license is canceled. A.R.S. §28-473(F) provides that upon receiving notice of conviction from a court, M.V.D. will suspend the person's driving privileges for a period of not less than three months for a first conviction and not less than six months for a second or subsequent conviction. (A.R.S. §28-473(F)(1), (2)).

IV. DUI

While we all fully expect that the *per se* blood alcohol level will be lowered to .08 in the next legislative session, the changes in the current DUI statute were only minor in nature and primarily affected offenses involving commercial vehicles. The most significant change in this area is the elimination of the statutory presumptions (A.R.S. §28-692(N)) for the commercial vehicle DUI offense.

The sentencing provisions for misdemeanor DUI did not change much. The only change is that now upon

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a second DUI conviction within five years, the "judge shall order the surrender of any driver's license of the convicted person, and the clerk of the court shall invalidate or destroy the driver's license and forward the abstract of conviction to the department." (A.R.S. §28-692.01(E)).

There were two minor modifications made in the area of felony DUI's. Previously, a DUI offense became a felony (aggravated) if it occurred while the person was driving in violation of a restriction which was placed on his license as a result of a violation of Section 28-692 or under Section 28-694. Under the new law, it is not necessary to show that the person was driving in violation of his restriction. A.R.S. §28-697(A)(1) now only requires that the DUI offense occur while the person's driver's license or privilege to drive is restricted as a result of violating Section 28-692 or under Section 28-694. Another noteworthy change in the felony DUI area can be found in the statute for the alcohol abuse treatment fund. Felony DUI offenders who work while in DOC may now have one-third of their wages deposited in their "spendable" account. (A.R.S. §31-255(B). The remaining two-thirds of their wages will be deposited in the alcohol abuse treatment fund account.

V. MISCELLANEOUS

Senate Bill 1132 also modified the causation requirements for the assessment of emergency response costs for persons operating motor vehicles, aircraft, water craft, or water skis while under the influence. Under the new law, it now must only be shown that the person under the influence caused the accident for the assessment to be made. (A.R.S. §28-699).

The last substantive change in Senate Bill 1132 affects eligibility for Shock Incarceration. A.R.S. §41-1604.08(A)(7) now provides that a person who commits negligent homicide or manslaughter is not eligible for Shock Incarceration.

VI. NEW DHS REGULATIONS

New regulations have been promulgated by the Arizona Department of Health Services for the determination of alcohol concentration. These regulations went into effect on April 28, 1994. You may obtain a copy of the new regulations by either contacting the training division of our office or the Arizona Department of Health Services, Division of State Laboratory Services, 3443 N. Central Avenue, Suite 810. You may also call the Arizona Department of Health Services at 255-3454 to obtain your copy. Now that police agencies statewide are implementing duplicate breath testing procedures, we thought it would be helpful to provide you with a copy of the new checklists to be used by operators in administering breath tests on the Mark IV GCI and the Intoxilyzer 5000. (See Pages 7 through 15.)

Bulletin Board

Training Schedule

On June 3, 1994, our office will sponsor our annual Ethics Seminar ***"Victims' Rights, Pretrial Publicity & Other Cutting-Edge Issues for Criminal Defense Lawyers."*** This event will be held from 1:30 to 4:45 p.m. in the Supervisors Auditorium (205 West Jefferson). Anyone interested in attending should contact Heather Cusanek at 506-7569.

Speakers Bureau

Tom Klobas spoke to the Lawyers Club of Sun City on April 21. Forty-five members attended the luncheon where Tom spoke for 1½ hours on the organization of our office, the impact of the budget crisis on our office, and his perspective of indigent representation.

EXHIBIT II
OPERATIONAL CHECKLIST

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD OPERATIONAL PROCEDURE
MARK IV GCI

DUPLICATE TEST

AGENCY_____
NAME OF SUBJECT_____DATE_____
INSTRUMENT NO._____LOCATION OF TEST_____
OPERATOR_____TIME OF TEST_____
TEST RESULTS 0._____ AC TIME _____
0._____ _____
0._____ _____

Immediately preceding the administration of the tests the subject underwent a 15 minute deprivation period from_____to_____by_____ .

( ) 1. OPERATE/STANDBY switch in STANDBY position.
( ) 2. Push OPERATE/STANDBY switch to OPERATE position. Wait until steady green light comes on.
( ) 3. Depress and release RESET button. Observe + .00 Digital Readout.
( ) 4. Depress and release ANALYZE button for blank reading.
( ) 5. Reading + .00.
( ) 6. Affix mouthpiece, take breath sample. Observe results in 90 seconds (record result and time of test).
( ) 7. Push OPERATE/STANDBY switch to STANDBY and push RESET.
( ) 8. If proper duplicate tests have not been obtained repeat steps 2 thru 7.
( ) 9. Remove RECORDER STRIP CHART, attach it to ALCOHOL INFLUENCE REPORT and add subject's name to STRIP CHART.

Note: Duplicate tests shall be between 5 and 10 minutes apart. Two consecutive tests shall agree within 0.020 alcohol concentration.

DHS/DSLS/Form C125(Rev.7-93)

EXHIBIT J

THIS REPORT PREPARED PURSUANT TO DUTY IMPOSED BY A.A.C. R9-14-404(A)

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD QUALITY ASSURANCE PROCEDURES MARK IV GCI

A. PROCEDURE FOR CALIBRATION CHECKS AND CRITERIA FOR TESTING AND ENSURING PROPER OPERATION

1. Perform initial calibration check by running one blank analysis followed by an alcohol standard.
2. Fill out the calibration and maintenance record.
3. The instrument is considered operating properly if it is found to be capable of determining the value of a known alcohol standard within ± .01 alcohol concentration or ± 10% whichever is greater.
4. At least one calibration standard will be used during a calibration check.
5. Operational controls and alcohol free subject testing are included in initial calibration check.

B. GAS CHROMATOGRAPH INTOXIMETER CALIBRATION AND MAINTENANCE RECORD

Agency _____ QA Specialist _____
(print name)

GCI_____LOCATION_____DATE_____19___

CALIBRATION STANDARD 0._____ AC

ACTUAL READING 0._____ AC DIFFERENCE 0._____ AC

OPERATIONAL CONDITION - PROPER AND ACCURATE - YES____NO____

_____

_____

REPAIRS OR ADJUSTMENTS_____

_____

_____

SIGNATURE _____

DHS/DSLS/Form C106(Rev.12-91)

EXHIBIT O
OPERATIONAL CHECKLIST

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD OPERATIONAL PROCEDURE
INTOXILYZER MODEL 5000*

AGENCY_____
NAME OF SUBJECT_____DATE_____
INSTRUMENT SERIAL NO._____LOCATION OF TEST_____
OPERATOR_____TIME OF TEST_____
TEST RESULTS 0._____ AC SAMPLE COLLECTED YES___NO___

Immediately preceding the administration of the test the subject was observed for 20 minutes from _____ to _____
by_____

( ) 1. Display reads "READY TO START" or "PUSH BUTTON TO START TEST". Breath tube is warm to touch.
( ) 2. Push Start Test button.
( ) 3. Insert card in response to display.
( ) 4. Air Blank completed.
( ) 5. Insert mouthpiece into breath tube. Have subject blow as long as possible. Result 0._____ AC.
( ) 6. a. If this sample is to be saved, remove end caps and attach collector device. Push Start Test button.
OR
( ) b. If this sample is not to be saved, push Start Test button immediately.
OR
( ) c. If sample purge begins immediately, go to step 7.
( ) 7. Air blank completed.
( ) 8. a. If a sample is saved, detach collector device and firmly cap both ends. Push Start Test button.
OR
( ) b. If a sample is not saved, push Start Test button immediately.
OR
( ) c. If display reads "TEST COMPLETE", go to step 9.
( ) 9. When display reads "TEST COMPLETE", remove test record card.

***WITH OR WITHOUT VAPOR RECIRCULATION**

DHS/DSLS/Form C115 (Rev. 12-91)

EXHIBIT OO
OPERATIONAL CHECKLIST

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD OPERATIONAL PROCEDURE
INTOXILYZER MODEL 5000*

DUPLICATE TEST - WITH SAMPLE CAPTURE OPTION

AGENCY_____
NAME OF SUBJECT_____DATE_____
INSTRUMENT SERIAL NO._____LOCATION OF TEST_____
OPERATOR_____TIME OF TEST_____

TEST RESULTS	AC TIME	SAMPLE COLLECTED YES	NO
0.			
0			
0			

Immediately preceding the administration of the tests the subject underwent a 15 minute deprivation period from_____to_____
by_____

( ) 1. Display reads "READY TO START" or "PUSH BUTTON TO START TEST". Breath tube is warm to touch.
( ) 2. Push Start Test button.
( ) 3. Insert card in response to display.
( ) 4. Air Blank completed.
( ) 5. Insert mouthpiece into breath tube. Have subject blow as long as possible. Record results above.
( ) 6. a. If this sample is to be saved, remove end caps and attach collector device. Push Start Test button.
OR
( ) b. If this sample is not to be saved, push Start Test button immediately.
OR
( ) c. If sample purge begins immediately, go to step 7.
( ) 7. Air blank completed.
( ) 8. a. If a sample is saved, detach collector device and firmly cap both ends. Push Start Test button.
OR
( ) b. If a sample is not saved, push Start Test button immediately.
OR
( ) c. If display reads "TEST COMPLETE", go to step 9.
( ) 9. When display reads "TEST COMPLETE", remove test record card.
( ) 10. Repeat steps 1 thru 9.

Note: Duplicate tests shall be between 5 and 10 minutes apart. Two consecutive tests shall agree within 0.020 alcohol concentration.

***WITH OR WITHOUT VAPOR RECIRCULATION**

DHS/DSLS/Form C129(Rev. 7-93)

EXHIBIT OOO
OPERATIONAL CHECKLIST

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD OPERATIONAL PROCEDURE
INTOXILYZER MODEL 5000*

DUPLICATE TEST - WITHOUT SAMPLE CAPTURE OPTION

AGENCY_____
NAME OF SUBJECT_____DATE_____
INSTRUMENT SERIAL NO._____LOCATION OF TEST_____
OPERATOR_____TIME OF TEST_____
TEST RESULTS_0._____AC TIME_____
_0_____ _____
_0_____ _____

Immediately preceding the administration of the tests the subject underwent a 15 minute deprivation period from_____to_____
by_____

( ) 1. Display reads "READY TO START" or "PUSH BUTTON TO START TEST". Breath tube is warm to touch.
( ) 2. Push Start Test button.
( ) 3. If display reads "INSERT CARD", do so.
( ) 4. Air Blank completed.
( ) 5. Insert mouthpiece into breath tube. Have subject blow as long as possible. Record results above.
( ) 6. Air blank completed.
( ) 7. a. If display reads "WAIT", go to step 8.
OR
( ) b. If display reads "TEST COMPLETE", go to step 9.
( ) 8. Repeat steps 1 thru 7.
( ) 9. When display reads "TEST COMPLETE", remove test record card. If duplicate tests have not been obtained between 5 to 10 minutes apart with a .020 AC agreement, repeat steps 1 thru 7.

Note: Duplicate tests shall be between 5 and 10 minutes apart. Two consecutive tests shall agree within 0.020 alcohol concentration.

***WITH OR WITHOUT VAPOR RECIRCULATION**

DHS/DSLS/Form C134

EXHIBIT P

THIS REPORT PREPARED PURSUANT TO DUTY IMPOSED BY A.A.C. R9-14-404(A)

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD QUALITY ASSURANCE PROCEDURES
INTOXILYZER MODEL 5000*

STANDARD CALIBRATION CHECK PROCEDURE

Agency _____ Date _____ Time _____
Intoxilyzer Serial# _____ Location _____
QA Specialist _____
(Print Name)

( ) 1. Pour a standard alcohol solution of known value into a clean dry simulator jar and assemble the simulator. Insure that a tight seal has been made.
Standard value: 0._____ AC
( ) 2. Turn on the simulator and allow the temperature to reach 34°C±.2°C.
( ) 3. Set Intoxilyzer mode selection in the ACA mode by switching mode selection switch #9 on or selecting "C" on keyboard menu.
( ) 4. Attach simulator to the simulator entrance port on the Intoxilyzer.
( ) 5. Intoxilyzer 5000 display reads "READY TO START" or "PUSH BUTTON".
( ) 6. Push Start Test button or press enter on keyboard.
( ) 7. Insert card in response to display.
( ) 8. Air blank completed.
( ) 9. Calibration check completed.
Test results 0._____ AC
( ) 10. Air blank completed.
( ) 11. When display reads Test Complete remove evidence card. Attach the card to the completed checklist.
( ) 12. Return mode selection switch #9 to off position after all calibration checks are complete or type Q and enter on keyboard.

SIGNATURE _____

***WITH OR WITHOUT VAPOR RECIRCULATION AND WITH OR WITHOUT KEYBOARD**

DHS/DSLS/Form C116 (Rev.7-93)

EXHIBIT W
OPERATIONAL CHECKLIST

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD OPERATIONAL PROCEDURE
INTOXILYZER MODEL 5000
WITH VAPOR RECIRCULATION WITH KEYBOARD

AGENCY_____
NAME OF SUBJECT_____DATE_____
INSTRUMENT SERIAL NO._____LOCATION OF TEST_____
OPERATOR_____TIME OF TEST_____
TEST RESULTS 0._____ AC SAMPLE COLLECTED YES___NO___

Immediately preceding the administration of the test the subject was observed for 20 minutes from _____ to _____
by_____

( ) 1. Display reads "READY TO START" or "PUSH BUTTON TO START TEST". Breath tube is warm to touch.
( ) 2. Push Start Test button.
( ) 3. Insert card in response to display.
( ) 4. Input information in response to display.
( ) 5. Air Blank completed.
( ) 6. Insert mouthpiece into breath tube. Have subject blow as long as possible. Result 0._____AC.
( ) 7. a. If this sample is to be saved, remove end caps and attach collector device. Push Start Test button.
OR
( ) b. If this sample is not to be saved, push Start Test button immediately.
OR
( ) c. If sample purge begins immediately, go to step 8.
( ) 8. Air blank completed.
( ) 9. a. If a sample is saved, detach collector device and firmly cap both ends. Push Start Test button.
OR
( ) b. If a sample is not saved, push Start Test button immediately.
OR
( ) c. If display reads "TEST COMPLETE", go to step 10.
( ) 10. When display reads "TEST COMPLETE", remove test record card.

DHS/DSLS/Form C132

EXHIBIT WW
OPERATIONAL CHECKLIST

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD OPERATIONAL PROCEDURE
INTOXILYZER MODEL 5000
WITH VAPOR RECIRCULATION WITH KEYBOARD

DUPLICATE TEST - WITH SAMPLE CAPTURE OPTION

AGENCY_____
NAME OF SUBJECT_____DATE_____
INSTRUMENT SERIAL NO._____LOCATION OF TEST_____
OPERATOR_____TIME OF TEST_____
TEST RESULTS 0._____AC TIME_____SAMPLE COLLECTED YES___ NO___
0_____ _____ ___ ___
0_____ _____ ___ ___

Immediately preceding the administration of the tests the subject underwent a 15 minute deprivation period from_____to_____
by_____

( ) 1. Display reads "PUSH BUTTON TO START TEST" or "PRESS START TEST BUTTON TO START NEXT TEST. Breath tube is warm to touch.
( ) 2. Push Start Test button.
( ) 3. If display reads "Insert Card", do so.
( ) 4. Input information in response to display.
( ) 5. Air Blank completed.
( ) 6. Insert mouthpiece into breath tube. Have subject blow as long as possible. Record AC result above.
( ) 7. a. If this sample is to be saved, remove end caps and attach collector device. Push Start Test button.
OR
( ) b. If this sample is not to be saved, push Start Test button immediately.
OR
( ) c. If sample purge begins immediately, go to step 8.
( ) 8. Air blank completed.
( ) 9. a. If a sample is saved, detach collector device and firmly cap both ends. Push Start Test button.
OR
( ) b. If a sample is not saved, push Start Test button immediately.
OR
( ) c. If display reads "TEST COMPLETE", go to step 10.
( ) 10. When display reads "TEST COMPLETE", remove test record card.
( ) 11. Repeat steps 1 thru 9.

Note: Duplicate tests shall be between 5 and 10 minutes apart. Two consecutive tests shall agree within 0.020 alcohol concentration.

DHS/DSLS/Form C133(Rev.7-93)

EXHIBIT WWW
OPERATIONAL CHECKLIST

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD OPERATIONAL PROCEDURE
INTOXILYZER MODEL 5000
WITH VAPOR RECIRCULATION WITH KEYBOARD

DUPLICATE TEST - WITHOUT SAMPLE CAPTURE OPTION

AGENCY_____
NAME OF SUBJECT_____DATE_____
INSTRUMENT SERIAL NO._____LOCATION OF TEST_____
OPERATOR_____TIME OF TEST_____
TEST RESULTS 0._____AC TIME_____
0_____ _____
0_____ _____

Immediately preceding the administration of the tests the subject underwent a 15 minute deprivation period from_____to_____
by_____

( ) 1. Display reads "PUSH BUTTON TO START TEST" or "PRESS START TEST BUTTON TO START NEXT TEST". Breath tube is warm to touch.
( ) 2. Push Start Test button.
( ) 3. If display reads"Insert Card", do so.
( ) 4. Input information in response to display.
( ) 5. Air Blank completed.
( ) 6. If display reads "IS SIMULATOR SOLUTION TEMPERATURE 34 C ± 0.2 C?", type Y or N and verify calibration check completed.
( ) 7. Insert mouthpiece into breath tube. Have subject blow as long as possible. Record AC result above.
( ) 8. Air blank completed.
( ) 9. a. If display reads "WAIT", go to step 11
OR
( ) b. If display reads "TEST COMPLETE", GO TO STEP 10.
OR
( ) c. If display reads "IS SIMULATOR SOLUTION TEMPERATURE 34 C ± 0.2 C?", type Y or N and verify calibration check completed. Go to step 10.
( ) 10. When display reads "TEST COMPLETE", remove test record card.
( ) 11. Repeat steps 1 thru 9.

Note: Duplicate tests shall be between 5 and 10 minutes apart. Two consecutive tests shall agree within 0.020 alcohol concentration.

DHS/DSLS/Form C137

Public Defender Restructuring

Editor's Note: In last month's issue of for The Defense, we presented "Thoughts on the Workload Review Guidelines" and the "Maricopa County Public Defender Workload Review Guidelines." As a follow-up to those articles, we are reproducing the memo sent by Dean Trebesch, Maricopa County Public Defender, to all superior court judges and commissioners (criminal division), all justices of the peace, and all juvenile division judges and commissioners in Maricopa County. The memo, which was accompanied by copies of "Maricopa County Public Defender Workload Review Guidelines," detailed the changes that our office has undergone as a result of budget considerations, the current status of our caseloads, and the resulting workload review guidelines.

MEMO

FROM: Dean Trebesch, Public Defender

DATE: April 22, 1994

SUBJECT: Public Defender Restructuring

As a result of the reduction in force, the office has made a number of changes that will impact our ability to serve the courts. In addition, I have initiated specific workload review guidelines for adult felony cases to ensure that our clients receive quality representation despite the cutbacks. (Similar guidelines will follow for juvenile cases).

The guidelines provide an attorney with a specific procedure to follow when the attorney's workload exceeds ethical standards. They also allow office management to address the attorney's workload problem internally and explore all possible alternative measures before the attorney moves to withdraw from cases. Pursuant to the guidelines, the office will not support an attorney moving to withdraw from a case unless:

1) the trial group supervisor, after carefully reviewing the attorney's workload, agrees that the workload exceeds ethical standards, and

2) there is no other attorney reasonably available to handle the case.

The guidelines are needed to address a dramatic increase in the workload of Public Defender attorneys. The number of jury trials has increased 50 percent over a year ago. Among other reasons, changes in County Attorney plea bargaining policies have resulted in not only more trials, but also in longer case preparation times. As a consequence, our active cases have increased by 20 percent over that same period. At the same time our staff is decreasing due to the reduction in force, hiring freeze, and budget restrictions.

Presently, we are 13 attorneys short due to budget constraints. Of the 13 attorneys, eight were lost to the office through the reduction in force. Overall, 19 employees were reduced because of the mandated reduction in force. Moreover, all of our staff, including attorneys, must take four days off without pay before July 1, 1994, to meet County requirements.

In addition, a large number of attorneys have volunteered to take substantial amounts of extra time off without pay to avoid deeper personnel cuts. The voluntary time off will result in more that $160,000 in savings to Maricopa County. The downside is that countless hours of attorney time will be lost between now and June 30.

To mitigate the losses throughout the office, I have taken the following steps with regard to our trial attorneys:

1) Abolished the position of trial group coordinator. Attorneys who were in the coordinator positions have been assigned full caseloads.

2) Assigned one-half caseload to the trial group supervisors.

3) Transferred one attorney from the Juvenile Division to the Trial Division.

4) Transferred one attorney from the Appeals Division to the Trial Division.

5) Assigned Chief Trial Deputy Bob Guzik to handle not guilty arraignments.*

6) Moved attorney Nora Greer from not guilty arraignments to the arraignment/plea calendar.*

7) Designated Bob Briney to cover those matters normally handled by Bob Guzik during the morning hours.

8) Directed Bob Guzik to initiate a system of attorney teams within the trial groups to provide peer monitoring and support.

These steps are designed to place every possible attorney "in the trenches." A trial group of 30 attorneys will be supervised by one attorney who must handle all client concerns, evaluations, assignment of cases, and supervision on top of his one-half caseload. The remaining attorneys will handle full caseloads.

(cont. on pg. 17)☞

In my view, the steps will result in a significant reduction in supervision, training, and ability to respond to problems, especially those that arise during the morning court calendars. Given the reality that, for budgetary reasons, nearly 60 percent of attorney hirings have been beginner level attorneys, lesser supervision and assistance could pose problems in your proceedings. On the other hand, a number of judges and County administrators have maintained that we have too many attorneys without caseloads. The steps I have taken should eliminate that perception.

Other actions were also taken by me:

1) Restructured our investigative operations to lessen the impact of three investigator vacancies; and eliminated our polygrapher function, reduced one process server, and cut our investigative aide position.

2) Despite numerous existing vacancies, we reduced two legal secretaries, our records manager, several office and records aides, and an automation employee.

Although service levels will suffer because of our cutbacks, I hope that these steps will minimize losses from the reduction in force and allow us to continue to provide quality service to both our clients and the courts. Thank you for working with us during these difficult times. Please feel free to call if you have questions.

Dean Trebesch
Public Defender

* At week's end, however, Joe Shaw graciously agreed to return, on a temporary basis, to his duties in an **unpaid, volunteer status.** While that continues, Bob Guzik will instead assume a partial caseload, in addition to his regular responsibilities. ◘

April Jury Trials

April 1

Greg Parzych: Client charged with child abuse. Trial before Judge Barker ended April 18. Client found guilty. Prosecutor Mills.

April 4

George Gaziano and Katie Carty: Client charged with kidnapping, sexual assault and burglary. Investigator M. Breen. Trial before Judge Jarrett ended April 11. Client found guilty. Prosecutor R. Campos.

Genii Rogers: Client charged with theft (with two priors). Trial before Judge Dougherty ended April 7. Client found guilty. Prosecutor Pucheck.

April 5

Rob Corbitt: Client charged with aggravated DUI. Trial before Judge Skelly ended April 7. Client found guilty. Prosecutor Peters.

Barry Handler: Client charged with aggravated DUI. Trial before Judge Hertzberg ended April 7. Client found **not guilty**. Prosecutor P. Hearn.

Nancy Johnson: Client charged with theft. Trial before Judge Chornenky ended April 11. Client found guilty. Prosecutor R. Mitchell.

James Lachemann: Client charged with aggravated DUI. Trial before Judge Brown ended April 12. Client found guilty. Prosecutor M. Ainley.

Ray Schumacher and Sylvina Cotto: Client charged with aggravated assault (dangerous). Trial before Judge Portley ended April 12. Client found **not guilty**. Prosecutor J. Hicks.

Rickey Watson: Client charged with possession of cocaine and possession of drug paraphernalia. Trial before Judge Kaufman ended April 6. Client found guilty. Prosecutor W. Baker.

April 6

David Goldberg: Client charged with aggravated assault (dangerous). Trial before Judge Dann ended April 7 with a **judgment of acquittal**. Prosecutor D. Patton.

(cont. on pg. 18)☞

April 7

Donna Elm: Client charged with three counts of endangerment. Trial before Judge Hauser ended April 7 with **judgments of acquittal**. Prosecutor C. Macias.

Shellie Smith: Client charged with burglary. Investigator J. Castro. Trial before Judge Hall ended April 8 in a mistrial. Prosecutor Grimley.

April 11

Valarie Shears: Client charged with sale of narcotic drug with a prior (on parole). Trial before Judge Schafer ended April 12. Client found **not guilty**. Prosecutor D. Schlittner.

April 12

Ray Vaca: Client charged with aggravated DUI. Trial before Judge Jarrett ended April 14. Client found **not guilty**. Prosecutor T. Tejera.

April 13

Peter Claussen: Client charged with DUI, BAC over 1.0, two counts of endangerment, criminal damage, and aggravated assault. Trial before Judge D'Angelo ended April 21. Client found guilty on DUI and criminal damage, guilty on lesser included offenses on BAC and endangerments, **not guilty** of aggravated assault. Prosecutor T. Doran.

Troy Landry: Client charged with attempted robbery. Investigator P. Kasieta. Trial before Judge Ryan ended April 14. Client found **not guilty**. Prosecutor Mason.

April 14

Steve Rempe: Client charged with sexual conduct with a minor, child molestation, and attempted molestation. Trial before Judge Cole ended April 26 with a hung jury. Prosecutor J. Garcia.

Jeanne Steiner: Client charged with aggravated assault. Trial before Judge Bolton ended April 20. Client found guilty. Prosecutor P. Howe.

April 18

Dan Carrion: Client charged with attempted murder second degree. Trial before Judge Seidel ended April 21. Client found guilty. Prosecutor A. Johnson.

John Taradash: Client charged with sale of narcotic drug. Investigator B. Abernethy. Trial before Judge Colosi ended April 20. Client found guilty. Prosecutor Stuart.

April 19

Rebecca Donohue: Client charged with public sexual indecency. Investigator B. Abernethy. Trial before Judge Hilliard ended April 22. Client found guilty. Prosecutor Grimley.

Albert Duncan: Client charged with burglary. Trial before Judge Hauser ended April 22. Client found guilty. Prosecutor Walecki.

April 20

Candace Kent: Client charged with sale of narcotic drug and resisting arrest. Trial before Judge Gerst ended April 25. Client found guilty. Prosecutor Mann.

April 21

Paul Lerner: Client charged with attempted sexual assault. Trial before Judge Barker ended April 26. Client found guilty. Prosecutor R. Campos.

April 25

Tim Agan: Client charged with two counts of aggravated assault. Trial before Judge Ryan ended April 29. Client found **not guilty** on one count and guilty on one count. Prosecutor C. Macias.

Dan Carrion: Client charged with aggravated assault (dangerous). Trial before Judge Bolton ended April 29. Client found **not guilty** of aggravated assault, but guilty of lesser included offense of disorderly conduct (misdemeanor). Prosecutor H. Schwartz.

Vicki Lopez: Client charged with multiple counts of custodial interference. Trial before Judge Schwartz ended April 26. Client found **not guilty**. Prosecutor Richards.

April 26

Rob Corbitt: Client charged with shoplifting and burglary. Trial before Judge Roberts ended April 28. Client found guilty. Prosecutor Vincent.

(cont. on pg. 19)☞

Jerry Hernandez: Client charged with aggravated DUI. Investigator M. Breen. Trial before Judge Jarrett ended April 28. Client found **not guilty**. Prosecutor B. Jennings.

April 27

Robert Doyle: Client charged with aggravated assault. Investigator P. Kasieta. Trial before Judge Hall ended April 28. Client found guilty of misdemeanor only. Prosecutor A. Kever.

Dan Patterson: Client charged with armed robbery. Trial before Judge Hilliard ended April 28 with a **judgment of acquittal**. Prosecutor D. Palmer.

Joe Stazzone: Client charged with aggravated assault. Trial before Judge O'Melia ended May 2. Client found **not guilty**. Prosecutor Collins. ◘

Arizona Advance Reports

Volumes 146 & 147

Volume 146

State v. Lopez,
146 Ariz. Adv. Rept. 3 (8/24/93)
Judge Peter T. D'Angelo

The defendant was convicted of first degree murder and sentenced to death. In an earlier appeal the convictions were affirmed but the death sentence was vacated and remanded for resentencing.

Defendant claims that the trial judge erred finding that the murder was committed in an especially cruel, heinous, and depraved manner. A murder is especially cruel if the victim consciously experiences physical abuse or mental anguish before death. The victim was stabbed 23 times and had her throat cut. She was also sexually assaulted and there were bruises on her body. She had defensive wounds on her forearms. Expert testimony indicated that this fatal nightmare lasted from 3 minutes to as long as 15 minutes. This murder was especially cruel.

Defendant also claims that the murder was not depraved or heinous. The factors to be considered are whether the defendant relished the murder, whether the defendant inflicted gratuitous violence, whether the defendant mutilated the body, whether the crime was senseless or whether the victim was helpless. Several of these scenarios are satisfied here. The defendant inflicted gratuitous violence on the victim. The murder was senseless and the victim was also helpless.

Defendant claims that the trial court did not consider his intoxication as a mitigating factor. Intoxication is considered in mitigation if the defendant's capacity to appreciate the wrongfulness of his conduct was significantly impaired, but not so impaired as to constitute a defense. There were witnesses who indicated that the defendant was intoxicated that night, but the defendant denied being intoxicated. The defendant has failed to carry his burden to prove intoxication as a mitigating circumstance.

Defendant claims that he might have been suffering from idiosyncratic or pathological intoxication. In this condition, an individual exhibits sudden and unpredictable behavior very shortly after ingesting a very small amount of alcohol. One expert testified that the defendant might have such a condition and another expert testified that he did not. The defendant failed to prove that he suffered from idiosyncratic or pathological intoxication.

Defendant claims that case law would lead a judge to the erroneous conclusion it must disregard evidence of intoxication unless such evidence rose to the specified statutory standard. Under *Lockett v. Ohio*, 438 U.S. 586 (1978), a sentencer must not be precluded from considering any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers in mitigation. Arizona case law and statutory law both comply with this constitutional command. The only limitation on mitigating evidence is that it be relevant (but See *Jeffers v. Lewis*, 974 F.2d 1075, (9th Cir. 1992)).

Defendant claims that his conduct during incarceration was a mitigating factor. Behavior in custody after a death penalty has been imposed may be considered in mitigation. However, claims of in-custody, good behavior are subject to close scrutiny. While defendant's record in the county jail was good, he had a long history of disciplinary problems while at the state prison. Given his overall prison record, the trial court found defendant's behavior in prison was not mitigating. On appeal, the death sentence is affirmed. [Represented on appeal by James R. Rummage, MCPD.]

(cont. on pg. 20)☞

State v. Russell,
146 Ariz. Adv. Rept. 11 (Div. 1, 8/24/94)
Judge Pro Tem Robert B. Stirling

Defendant was convicted of second degree burglary by taking property from his neighbor's mobile home. At trial, the defendant represented himself pro per with the assistance of advisory counsel. Defendant argues that the trial court erred in allowing him to waive his right to counsel. While the defendant did sign a waiver of counsel form, the trial court did not on the record advise defendant about the dangers of waiving counsel and did not state that defendant's waiver was knowing, intelligent and voluntary. However, the record in this case adequately shows the defendant's waiver of counsel was knowing, intelligent and voluntary. He moved to represent himself well in advance of trial. He demonstrated adequate familiarity with legal proceedings and noted in his request that he would bear the personal consequences of a conviction. While the better practice would be for the trial judge to make specific findings, the absence of such findings does not amount to reversible error if the record adequately shows that defendant's waiver was knowing, intelligent and voluntary. The record here properly reflects the waiver of counsel.

The jury was instructed that the crime of second degree burglary requires proof that the defendant entered or remained unlawfully in a residential structure with the intent to commit any felony therein. Defendant claims that the instruction is erroneous because it did not mention theft or define the word "felony." Defendant failed to object to the instruction at trial and the issue is preserved only if fundamental error. Neither the omission of the word "theft" nor failure to define the word "felony" went to the foundation of the case, took from the defendant a right essential to his defense or deprived him of a fair trial. It also did not negate his argument to the jury that he lacked the intent to commit any crime or that he entered the trailer and removed property because someone hired him to do so. No fundamental error occurred.

At sentencing, defendant received an aggravated sentence. The reasons given were that he was on parole for only four months before the crime, that his earlier crimes endangered the public, that he performed poorly on parole and that the crime involved taking the property of another. All of the first three factors are clearly within the omnibus provision of A.R.S. § 13-702(D)(13) and are appropriately considered. The final factor of taking the property of another is an element of the offense but is permissibly used as an aggravating circumstance under *State v. Lara*, 171 Ariz. 282 (1992).

Defendant claims that he received ineffective assistance of advisory counsel. When a defendant waives his right to counsel, he has no constitutionally protected right to challenge the advice or services provided by advisory counsel. *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

At trial, the defendant subpoenaed a witness. The witness appeared to testify but the defendant was unaware of her presence in the courthouse. She left without testifying because someone told her she was not needed. Defendant claims he was denied his right to compulsory process. The right to compulsory process grants all criminal defendants the right to present witnesses in their defense. Defendant neither called nor attempted to call the witness at trial. No denial of compulsory process occurred.

State v. Fogarty,
146 Ariz. Adv. Rept. 15 (Div. 1, 8/24/93)
Judge Cheryl K. Hendrix

Defendant was convicted of flight and other charges. The defendant refused to stop on the police's command, but never took any evasive action and did not lead the police on a high-speed chase. Defendant contends that the facts do not establish that he committed felony flight. Any driver who willfully flees or attempts to elude a pursing official law enforcement vehicle is guilty of a class 5 felony. Any refusal to stop on command of an officer who is in a police car violates the felony flight statute because of the potential for personal danger inherent in vehicular pursuit. The defendant engaged in behavior that had a greater potential for harm than would a mere refusal to stop for a police officer on foot. An automobile, when misused or driven by a person whose attention is divided, can be a dangerous instrumentality. The failure of a motorist to stop may provoke a pursuer into dangerous driving. The facts of the case fit the meaning of the terms willfully fleeing or attempting to elude.

State v. Alexander,
146 Ariz. Adv. Rept. 17, (Div. 1, 8/24/93)
Judge Charles D. Adams

Defendant was accused of helping to rob and beat an elderly man in his home. He pled guilty to aggravated robbery, residential burglary, theft and aggravated assault. He was sentenced to prison and ordered to pay $400 in felony penalty assessments. Defendant contends that the trial court erred in ordering him to pay four felony penalty assessments because each crime arose out of a single episode. A.R.S. § 13-116 provides that an act which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent. The first step of the *Gordon* analysis [*See State v. Gordon*, 161 Ariz. 308 (1989)] is to determine the ultimate crime.

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The ultimate crime has a factual nexus to all the other crimes, will usually be the primary object of the episode, and is usually the most serious crime committed. In this case aggravated robbery was the ultimate crime. The next step of the test is to consider all the facts of the incident, subtract the facts necessary to convict for the ultimate crime, and determine if the remaining facts satisfy the elements of the other crimes. If so, multiple punishments may be possible. After subtracting all the facts necessary for the robbery, the elements for the aggravated assault remain. However, there are insufficient facts left for separate punishments for theft and residential burglary. These crimes did not cause the victim to suffer additional harm beyond that inherent in the aggravated robbery. The felony penalty assessment is reduced from four hundred to two hundred dollars.

State v. Padilla,
146 Ariz. Adv. Rept. 25 (Div 1, 8/26/93)
Judge Jay M. Abbey

Defendant pled guilty to three counts of sale of a narcotic drug, all class two felonies. Defendant claims that he received ineffective assistance of trial counsel because his lawyer had a conflict of interest. The lawyer, without obtaining a waiver, represented the defendant's wife, his brother, and his sister-in-law on charges stemming from the same investigation. A defendant alleging ineffective assistance of counsel because of a conflict of interest must demonstrate that an actual conflict existed and that the conflict adversely affected the representation. While his wife and other family members were separately indicted, all the cases arose out of the same series of transactions. The cases were treated at every level as companion cases that concerned a family enterprise. An actual conflict existed.

The conflict also adversely affected the representation. Defendant claims that his lawyer had an actual conflict because he did not pursue an alternative defense strategy of defendant's testifying against his family members in exchange for a better deal. While the conflict was real enough, there was no adverse effect in this case because of defendant's testimony at a post-conviction relief hearing that he would have never entertained a plea that calls for him to testify against his family. However, an actual conflict existed at sentencing. Defendant's wife was sentenced immediately before the defendant. The same attorney conducted both sentencings. In the sentencing for the defendant's wife, the attorney made arguments that shifted the blame to defendant from his wife. The attorney's act of disservice to the defendant's interest at sentencing compels a finding of ineffectiveness. The attorney's implicit advocacy against his client at the time of sentencing requires that the matter be remanded for resentencing.

State v. Hamilton,
146 Ariz. Adv. Rept. 28 (Div. 1, 8/26/93)
Judge Michael D. Ryan

Defendant was convicted of three counts of child molestation and three counts of sexual conduct with a minor. Defendant was sentenced to 110 years in prison.

Defendant claims that two of the child molestation counts occurred at a time when the victims were between 14 and 15 years old. At that time, A.R.S. § 13-1410 made it a crime to molest a child under the age of 15 years. By the time of trial and sentencing, the legislature had amended A.R.S. § 13-1410 to make child molestation apply to children under the age of 14 years. Defendant claims that his child molestation sentences constitute cruel and unusual punishment because the conduct constituting the offenses was not the same crime at the time of sentencing. Defendant also claims the judgments are defective. In Arizona, statutes do not apply retroactively unless they specifically so provide. An offender must be punished under the law in force when the offense was committed and is not exempted from punishment by a subsequent statutory change.

Defendant claims the length of his sentences constitutes cruel and unusual punishment under *State v. Bartlett*, 171 Ariz. 302 (1992). In *Bartlett*, the court applied *Solem v. Helm*, 463 U.S. 277 (1983) and found that the sentences were grossly out of proportion to the severity of the crime. The circumstances surrounding *Bartlett* are very different than the circumstances of this case. Nothing here warrants a conclusion of disproportionality. *Bartlett* was young, his victims were willing participants and were not traumatized by the events. This defendant was much older than the victims, the victims were unwilling, and they suffered long-term effects. Unless there is an inference of disproportionate punishment, no further analysis under *Solem* is needed.

The state called an expert witness to testify regarding the general characteristics of child molesters and their victims. The expert testified concerning child abuse accommodation syndrome. Defendant argues that the expert was not qualified, that this syndrome is not a proper subject for expert testimony and that the probative value of the testimony was outweighed by its prejudicial effect. The expert testified as to her extensive experience and clearly qualified as an expert. Testimony regarding the general behavioral characteristics of child molesters and their victims is helpful to jurors and is a proper subject for expert testimony under *State v. Moran*, 151 Ariz. 378 (1986). The generalized nature of the expert's testimony did not make it unfairly prejudicial in this case.

At trial, the state's expert discussed a scientific article by another expert. Defendant claims this was hearsay and denied him his right to confront the witnesses

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against him. The confrontation clause is satisfied when the proffered evidence comes within a firmly rooted exception to the hearsay rule. The other expert's article falls squarely within the "learned treatise" exception of Rule 803(18). Defendant's confrontation rights were not violated by this hearsay testimony.

Defendant claims that several of the counts against him were duplicitous. Duplicitous indictments are prohibited because they fail to give adequate notice, present a hazard of a non-unanimous verdict and make a precise pleading of double jeopardy impossible in the event of a later prosecution. While the indictment did allege time periods up to one year, the charges involved one specific act against one specific victim. The testimony at trial was specific as to each occurrence and the prosecution delineated during closing argument what specific conduct constituted the offense in each specific count. Defendant does not show any actual prejudice from these duplicitous indictments.

State v. Ayala,
146 Ariz. Adv. Rept. 55 (Div. 2, 8/31/93)
Judge Stephen M. Desens

The police sought to speak to the defendant regarding a burglary. When they came to his home, they had no search warrant. Defendant's fifteen-year-old brother answered the door. The brother indicated that both his mother and father were away. The police asked if defendant was home and said they needed to speak to him. The brother opened the door, invited the officers in, and led them to the defendant's bedroom. The brother opened the door and woke the defendant. When questioned by the officers, defendant confessed to the crimes.

Defendant moved to suppress the confession as the product of an illegal entry into his home. The trial court agreed, finding that the minor brother could not validly consent to the officers' entry into his home. The state appealed. The purpose of the officers' visit was not to search the premises but rather talk to the defendant. They first asked to speak with a parent and then asked to speak with the defendant. They did not request permission to enter but were admitted in direct response to their questions. Considering the circumstances as a whole, the officers could reasonably have concluded that the brother had the authority to consent to their entry into the house. The trial judge erred in concluding as a matter of law that the minor brother's consent was insufficient or invalid.

State v. Romero,
146 Ariz. Adv. Rep. 57 (Div. 1, 8/31/93)
Judge David R. Cole

Defendant was found guilty of six counts of aggravated assault and was convicted of participating in a drive-by shooting. Defendant claims that the police did not have proper grounds to conduct a *Terry* stop and the evidence should have been suppressed. If an officer has a reasonable suspicion, based upon specific and articulable facts, that a suspect is involved or wanted in connection with a crime, then a brief stop to investigate that suspicion in fact is allowed. *Terry v. Ohio*, 392 U.S. 1 (1968). The stop in this case was well within the confines of the *Terry* standard. There had just been shots fired at people in a nearby area. Within a short time and distance from the scene, the police spotted a vehicle and two men fitting the given description. Both locations also matched what police knew about rival gangs in each area. Under the circumstances the officer was justified in stopping the defendant for further investigation.

Defendant claims that the police's excessive use of force also calls for suppression. As the officer exited his vehicle and called to the two potential suspects, he drew his weapon but kept it hidden behind his car door. As the suspects approached, the officer raised his weapon and told them both to lie on the ground while he called for assistance. An officer may take reasonable measures to neutralize the risk of physical harm and determine whether the person detained is armed. The use of force here did not transform this stop into an arrest because the situation explained the officer's fear for his personal safety. The use of a weapon does not necessarily convert an investigation into an arrest.

At trial, the state produced evidence to show that the defendant was a member of a particular gang and the victim a member of a different gang. The evidence was relevant to prove motive for the shooting. The defendant claims that the state failed to conclusively prove the victim's membership in a rival gang. At trial, the police testified that most victims identified themselves as former or current rival gang members. While the victims themselves all denied gang membership, the conflicting evidence made the question one for the jury to resolve. Sufficient evidence existed for the jury to determine this fact by a preponderance of the evidence. The jury was also given a limiting instruction that the issue of gang membership was raised for purposes of motive only. No error occurred. [Represented on appeal by Garrett W. Simpson, MCPD.]

(cont. on pg. 23)☞

Crerand v. State of Arizona,
146 Ariz. Adv. Rept. 73, (Div. 1, 8/31/93)
Judge Michael J. O'Melia

The defendant was sentenced to prison with credit against his sentence for presentence incarceration. The Arizona Department of Corrections did not give him any earned release credits for the time spent in presentence incarceration. (See A.R.S. § 41-1604.) Defendants do not earn release credits against their prison sentence until they are transferred to the Department of Corrections. Denial of earned release credit for presentence incarceration time does not violate equal protection. A rational basis for the distinction exists because the purpose of the state prison is rehabilitation, while the purpose of the county jail is simply detention.

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State v. Henry,
147 Ariz. Adv. Rept. 3 (Supreme Court, 9/2/93)
Judge Stephen F. Conn

Trial Issues

Defendant was convicted of first degree murder and other charges. He was sentenced to death.

At trial, he wanted to introduce his co-defendant's statement that put the co-defendant at the scene of the crime and not defendant. The trial judge refused to admit the statement. Defendant claims the statement was admissible because it was against the co-defendant's interest. Three elements must exist to admit a statement against the declarant's interest offered to exculpate the accused: the declarant must be unavailable, the statement must have been at the time of its making so far contrary to the declarant's interest that a reasonable person would not have made the statement unless believing it to be true, and corroborating circumstances must clearly indicate the trustworthiness of the statement. The co-defendant was unavailable because he would have asserted his fifth amendment privilege. The statement also tended to subject the co-defendant to criminal liability. However, the statement lacked trustworthiness. The only corroborating evidence was the defendant's self-serving testimony. Other evidence tended to disprove the statement, including the forensic analysis done at the scene. No error occurred.

Defendant claims there is insufficient evidence to convict him and that he was entitled to a new trial. There was sufficient evidence to support the murder, kidnapping, and robbery charges. There was also sufficient evidence to support a conviction for theft as a class 3 felony. The trial judge also did not err in denying the motion for new trial alleging the verdict was against the weight of the evidence.

Defendant was arrested pursuant to a traffic stop and given his *Miranda* warnings. He claims on appeal that he did not knowingly and intelligently waive his rights during a police interview six hours later. When the defendant was advised of his *Miranda* rights, he responded that he had heard them plenty of times before and knew them better than the officer did. Defendant never invoked his right to remain silent and never asked for an attorney. Further warnings were not required absent circumstances suggesting that defendant was not fully aware of his rights. No such circumstances appear here.

Speedy Trial

Defendant claims that his right to a speedy trial was violated. While trial occurred nearly 18 months after his arrest, all but 90 days were excludable. Defendant claims that the trial judge erred in granting continuances where no written motion was filed and there was no finding that extraordinary circumstances requiring continuance existed. While the trial judge may not have followed the technical letter of Rule 8.5, no abuse of discretion occurred. A defendant who requests a trial continuance may not complain that it was improper because he failed to file a written request or that there was no finding that it was in the interests of justice. There was also no denial of the defendant's constitutional right to a speedy trial. Although the overall delay was lengthy, there was no prejudice. Preparation of the defense caused much of the delay.

Evidentiary Issues

At trial, the jury learned that there was an outstanding warrant for the defendant at the time of his arrest. Defendant claims that the trial court erred in admitting this evidence. Rule 404(b) allows evidence of other crimes, wrongs, or acts to prove motive. The warrant was relevant to show defendant had a motive for taking the victim's truck after his own broke down. The evidence was also admissible to complete the story of the offense. The jury was given a proper limiting instruction. No error occurred.

At trial, the arresting officer testified that defendant said nothing about the murder when he was stopped on the highway. The state argued in closing that this failure to volunteer information didn't make sense compared to his claim of innocence at trial. Defendant

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claims this evidence violated his right to remain silent, and was irrelevant and inadmissible. The state may not impeach a testifying defendant with his post-arrest silence. *Doyle v. Ohio*, 426 U.S. 610 (1976). Silence following *Miranda* warnings is ordinarily so ambiguous as to have little probative value. *United States v. Hale*, 422 U.S. 171 (1975). However, this case does not involve silence induced by *Miranda* warnings. The defendant talked freely at various times. The stories he told were vastly different from one another. The defendant waived his rights here by his inconsistent post-arrest statement. *Anderson v. Charles*, 477 U.S. 404 (1980). Because the evidence was relevant only as impeachment, the state should not have elicited the testimony in its case-in-chief. Since it could have done so on cross-examination, however, and did do so on rebuttal, the error does not require reversal.

At trial, defendant sought to call his co-defendant to the stand to force him to claim his fifth amendment privilege in front of the jury. The trial judge denied this request. A person who may legitimately refuse to answer questions on the stand may be excused from being called as a witness without violating a defendant's right to compulsory process. The co-defendant would have invoked his fifth amendment right if called to testify and the jury would not have been permitted to infer the co-defendant's guilt from his silence. No abuse of discretion occurred.

At trial the defense claimed that the state had confused some of his footprints. On rebuttal, the state offered new evidence of defendant's footprints. Defendant claims he should have been allowed surrebuttal testimony. There was actually nothing new about the testimony of the tracker on rebuttal and no need for surrebuttal.

Prosecutorial Misconduct

Defendant claims the prosecutor committed misconduct in a number of ways. During closing arguments, the prosecutor called the defendant a psychopath and said that his co-defendant was equally guilty of first degree murder. The trial judge properly sustained an objection to the psychopath comment but denied a mistrial. The judge's determination that this comment did not influence the verdict is supported by the record. Defendant claims that it was also misconduct for the prosecutor to intimate that his co-defendant had accused him where he had no opportunity to cross-examine his co-defendant. At trial, there was testimony that the co-defendant was blaming the defendant for the murder. Even defense counsel argued that defendant and his co-defendant were pointing fingers at each other. No error occurred.

Defendant also claims that the prosecutor improperly vouched for witnesses by stating that the system doesn't put innocent people in jail. Improper vouching occurs when the prosecutor places the prestige of the government behind its witnesses. The comment was invited by the defense. Defense counsel implied that the state would try to convict both defendants by arguing that the other was the innocent co-defendant and that this was how the system worked. The invited response doctrine encourages the court to review and assess whether the defendant was unfairly prejudiced. No prejudice occurred here.

Jury Instructions

Defendant claims that the trial court erred in failing to give instructions on manslaughter and negligent homicide. Defendant testified that he left the victim alone with the co-defendant, raising the issue of whether he was reckless or negligent to do so. Even if the jury believed defendant's story, the co-defendant's conduct had no bearing upon the matter in which the victim was murdered. The record lacks evidence that the victim was killed in a negligent or reckless manner and no instructions were required.

Defendant claims that the court erred in failing to instruct that robbery requires the co-existence of the use of force and an intent to steal. The instruction given by the court adequately informed the jurors of the co-existence requirement.

Jury Note

During deliberations, the jurors sent a note asking, "Is it kidnapping after the victim is removed from the truck at the crime scene?" The trial judge responded with a note that the jury should apply the law and the instructions to the facts. Defendant objected and wanted the judge to add "Only if you find that he did it as opposed to the co-defendant doing it." Defendant claims that the trial court erred in failing to give this additional answer to the note. It was neither appropriate nor necessary to say any more under the circumstances. The answer requested by the defense might well have violated the Arizona constitutional prohibition on judicial commentary on the evidence.

Defendant claims that the trial judge erred in denying a duress instruction. He claims that he was compelled by his fear of his co-defendant to flee in the victim's truck. Defendant did not request this instruction in trial and there is no record to support such an instruction. No error occurred.

At trial, defendant requested a *Willits* instruction on the state's failure to secure his truck. If the state

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destroys evidence the contents or quality of which are at issue, the jury may infer that the true facts are against the state's interest. *State v. Willits*, 96 Ariz. 184 (1964). To be entitled to a *Willits* instruction, a defendant must show that the state failed to preserve materially and reasonably accessible evidence having a tendency to exonerate him and that this failure resulted in prejudice. Defendant claims that valuable tools in his truck would have established a motive for him to return to Las Vegas. However, defendant was able to prove at trial that he left valuable tools behind in Las Vegas. Beyond this, the truck had no material exculpatory value. No error occurred.

Self Representation

For a brief time before trial, defendant represented himself. Defendant claims that his right to self-representation was unduly infringed because jail officials did not permit him use of the law library. A criminal defendant has a constitutional right to represent himself. The fifth amendment guarantee of access to the courts requires that he be provided an adequate law library or legal help. When the defendant went *pro per*, his lawyer was appointed to serve as his advisory counsel. Appointment of both advisory counsel and an investigator afforded him the meaningful access required by the Constitution. An inmate does not have the right to select his or her preferred means of access.

Defendant claims that he experienced difficulty receiving information about the case from his lawyer. Even assuming the truth of this assertion, the record lacks evidence that he was denied a fair trial.

After trial, the defendant moved to again represent himself. The court denied the motion but defendant was allowed to file a lengthy hand-written motion for new trial and permitted to argue in court. The fundamental question is not one of the wisdom of the defendant's judgment but whether the defendant's waiver of counsel was made in an intelligent, understanding and competent manner. A death-eligible defendant may represent himself at sentencing provided he understands the proceedings, the possible consequences and the disadvantages of acting as his or her own attorney. As this case is being remanded for resentencing, the trial judge will have to make this determination should defendant again insist on representing himself at resentencing.

Ineffective Assistance of Counsel

Defendant claims that he received ineffective assistance of counsel in a number of ways. First, he claims that his lawyers were ineffective because they did not obtain a scaled photo layout of the crime scene. There is no showing that the absence of a series of photographs in a grid sequence affected the results here. Defendant also complains that his lawyers did not obtain a tracker to counter the state's expert witness at trial. He fails to show how this would have made a difference in the result. Defendant also claims that his lawyers failed to locate various witnesses who allegedly saw his co-defendant with a knife the day of the murder. At the Rule 32 hearing, the witnesses either had nothing relevant to offer or were unfavorable. Defendant fails to show that the asserted testimony would likely have affected the outcome of his case.

Defendant also contends that his lawyer failed to call a jail inmate as a defense witness to show that the co-defendant confessed to the murder. At the Rule 32 hearing, counsel testified that he thought the witness was lying. He also testified that the witness had 10 prior felonies, was unbelievable and that he was a poor choice as a defense witness. Counsel's decision not to call this witness was reasonable. Defendant also claims that his lawyer should have withdrawn because their relationship was severely strained. Although the relationship might have been difficult, it did not prevent the attorney from asserting a vigorous defense on defendant's behalf. Defendant finally claims that the lawyer was ineffective for presenting his closing argument from 4 to 5:30 p.m. and failing to seek continuance until the next day. The argument is frivolous. Defense counsel was not given a time limit, he never contended that he was prevented from arguing any particular point to the jury, and the case did not end until much later that day. Defendant has failed to prove any ineffective assistance of counsel.

Sentencing

In considering the sentencing issues, the case is remanded for resentencing. The defendant's prior California conviction for involuntary manslaughter is not necessarily a felony involving the use or threat of violence on another person. The statutory definition of the prior crime, not its specific factual basis, dictates whether an aggravating circumstance exists. The California offense could have been committed without the exertion of physical force so as to injure or abuse. Because the trial judge improperly considered the prior involuntary manslaughter an aggravating circumstance, the matter is remanded for resentencing.

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conviction is not a second charge of violating A.R.S. § 28-692. The DUI criminal statute provides for enhanced punishment for a second violation of § 28-692 or conviction of an act in another state which would be a violation of A.R.S. § 28-692. The suspension statute (A.R.S. § 28-445(A)(7)) has no similar language. The plaintiff's previous out-of-state DUI conviction was not a prior conviction violating § 28-692. But, *see Parker v. Prins*, 157 Ariz. 15 (App. 1988).

State v. Hopkins,
147 Ariz. Adv. Rept. 59 (Div. 1, 9/9/93)
Judges Walter Lee Jackson and Michael D. Ryan

Defendant was convicted of one count of child molestation and two counts of sexual abuse of a minor. Prior to trial, the prosecutor avowed what its psychological expert would testify to if he were called on the emotional propensity issue. The state argued that evidence of the defendant's prior child molestations was admissible to establish his emotional propensity to commit this crime. These alleged acts occurred ten years before the current charges. Where the prior acts are remote in time or dissimilar in nature to the crime charged, they are inadmissible unless there is reliable expert medical testimony that such acts show a continuing emotional propensity to commit the crime charged. *State v. Treadaway*, 116 Ariz. 163 (1977). Here the state fell well short of meeting this reliability requirement. No medical expert testified at the pretrial hearing or at the trial. The state offered no affidavits or written reports instead of such testimony. Neither the trial judge nor defense counsel could question the expert or evaluate his reliability. The state also made no actual avowal that the absent expert would testify to emotional propensity. There is nothing in the record to show that the various innocent interpretations of these prior acts are any less reliable than the uninformed criminal interpretation urged by the prosecution. The trial judge erred in admitting evidence of these 10-year-old prior bad acts without expert testimony of their relevancy, especially where the prosecution's rendition of the anticipated testimony was riddled with uncertainty and speculation. The trial court abused its discretion in admitting this evidence where there was no reliable expert medical testimony to show emotional propensity.

Aakhus v. Hammock,
147 Ariz. Adv. Rept. 88 (Div. 1, 9/16/93)
Judge Marilyn A. Riddel

Plaintiff was stopped for DUI. He agreed to take the breathalyzer test but provided a deficient sample. The partial sample revealed a breath alcohol content of .19. The prosecutor filed charges under A.R.S. § 28-692(A)(2) for having a BAC of .10% or more within two hours of driving. Petitioner claims that the motor vehicle division may not use this deficient sample reading to both prosecute him criminally and take his license. *See Sherrill v. ADOT*, 165 Ariz. 495 (1990). This case is distinguishable from *Sherrill* because this petitioner intentionally failed to cooperate. Even given the prosecution's use of the deficient sample, the petitioner's license could still be suspended for his non-cooperation.

State v. Foy,
147 Ariz. Adv. Rept. 91 (Div. 1, 9/16/93)
Judge David R. Cole

Defendant pled guilty to theft and was ordered to pay restitution exceeding $14,000. The judge also ordered defendant to pay 10% interest on the restitution amount.

Defendant claims that the court was without jurisdiction to modify the sentencing order because the award of interest on the restitution was made more than 10 days after pronouncement of sentence. A trial judge may modify the amount of restitution as a condition of probation after a hearing with notice and an opportunity to be heard.

Defendant argues that the court's order increasing his restitution was invalid because it increased his punishment after he had commenced serving his sentence. The interest was not an increase in punishment, but rather a non-punitive aspect of probation directed towards a proper goal to make the victim whole.

However, restitution does not accrue interest. Restitution includes economic losses incurred as a direct result of the offense but excludes consequential damages. Post-judgment interest on awards of restitution is not a loss that would not have been suffered but for the offense. [Represented on appeal by Stephen R. Collins, MCPD.]